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No. 3199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation), claimant of the American Steam Tug "Fearless", her boilers, engines, tackle, apparel and furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC. (a corporation),

Appellee.

BRIEF FOR APPELLANT.

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Proctors for Appellant.

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THE FACTS.

This case arose from a series of misunderstandings between the captain of the Steamer "Edith" who was taking the steamer under her own power from pier 46 in San Francisco Bay to the Hunters Point drydock and the captain of the Tug "Fearless" who was employed to "assist" the "Edith" in the maneuver. As a result of these misunderstandings the "Edith" drifted over 2000 feet in the waters of the bay and finally collided

with pier No. 32, sustaining injuries to her starboard side.

There is no dispute in the testimony as to the character of service to the "Edith" for which the tug was employed. The "Edith" was to use her own engines and the tug was to "assist" her in backing from the slip and in turning her round on a maneuver known to the "Edith's" captain and undisclosed to the tug. There is no dispute that the commanding mind as between the two captains was that of McDonald on the "Edith" until at any rate the vessel had backed several hundred feet clear of the slip (McDonald Dep. 75). The primary questions here are whether the "Edith's" captain properly planned and organized for the maneuver with the assisting tug, and whether he ever transferred the controlling authority in the maneuver from himself to the captain of the tug, and whether if he did so, he conveyed the information as to the conditions on the "Edith" to the tug's captain, which was necessary for his guidance on the shifting of the command.

Of the many witnesses on the "Edith", but two were produced and their testimony was taken by deposition. No excuse was offered for not producing all these other witnesses nor any given for the failure to produce the "Edith's" logs which were demanded by the tug's proctor (48).

The two depositions in evidence were those of the captain and second mate, through whose thoughts and actions the planning for the maneuver and the alleged

subsequent transfer of authority could alone have been made and if made the proper information as to any changed conditions on the "Edith" given to the new commander. We thus approach this portion of the case, upon which the entire question of causation rests, unembarrassed by any presumptions arising from the adverse decision below. This court is as well able to determine from the captain and second mate depositions whether they had properly planned and organized for the maneuver and whether they had subsequently transferred the command and responsibility and communicated the necessary information to the new chief, as was the trial court. It is as well able to draw inferences so far as they may affect the testimony in the deposition, from the failure to produce the engine room and other logs of the "Edith" and her engineer, her first and third mate and the many members of her crew who handled her tow lines.

On the afternoon of March 4, 1916, the Steamer "Edith", 328 feet long and of about 2700 tons net register, was lying bow in-shore at pier 46 of the San Francisco docks, waiting to start on a trip under her own power and under the dominion of her master, Captain McDonald, from the pier to the drydock at Hunters Point. The voyage was to be in a general southerly direction at right angles to the pier. Pier-head 32, against which the "Edith" finally drifted, was over 2200 feet northerly from her mooring place. Pier 46 is the most southerly of the parallel line of piers projecting at right angles to the San Francisco shore line,

which there runs about north and south, angling slightly to the easterly in the north half of the group.

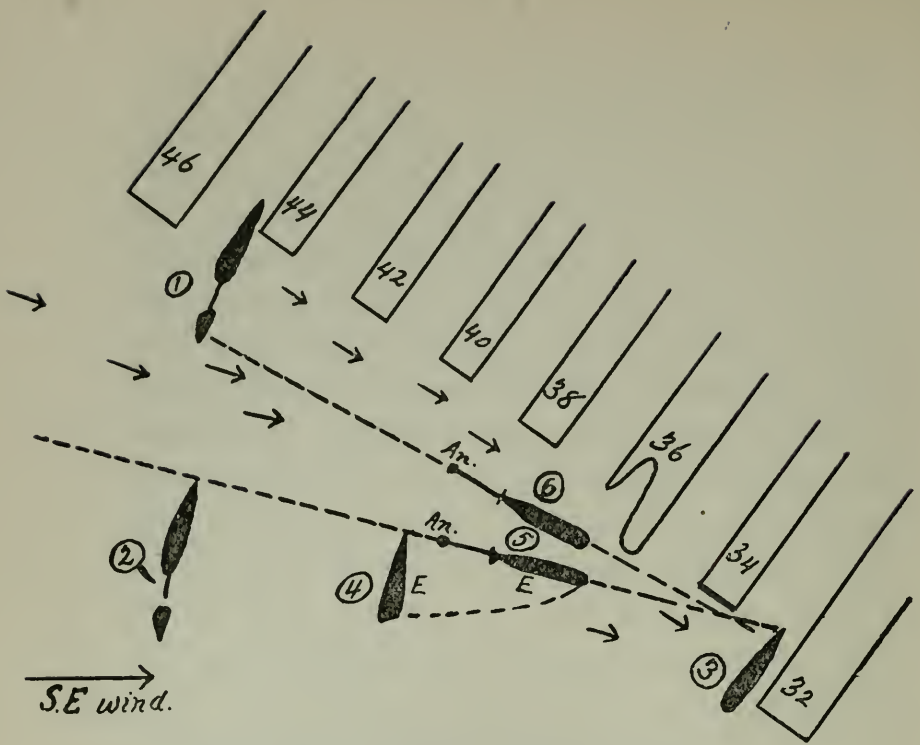
The piers are numbered consecutively to the northerly from pier 46, as 44, 42, 40, 38, 36, 34 and 32, and the maneuvers involved in the case are confined to the waters of the bay off piers 46 to 32. Pier 46 extends into the bay about 800 feet from the water-front line; 44, 42 and 40 extend 650 feet from the water-front line; 38, 667 feet; 36, 721 feet; 34, 662 feet, and 32, 805 feet. On account of the bend in the shore line, pier-head 32 extends to the easterly over 300 feet beyond pier-heads 44, 42, 40 and 38, while it extends over 200 feet beyond pier-head 34.

A clear reach of San Francisco Bay of over thirty miles lies to the southerly of this group of piers, and the tide, which was then well in the ebb, was flowing in the direction from pier 46 to pier 32, and on account of the narrowing of the bay at this point, on towards the shore line. As the uncontradicted testimony shows, close to the heads of the piers, the ebbing tide ran more nearly at right angles to the piers than it did a little further out in the bay.

There was a strong southeasterly wind (18 miles) blowing during the period in question. That is to say, the wind was blowing at an angle of about 45 degrees onto the docks. It is thus apparent, and it is uncontested in this case, that any vessel lying in the waters of the bay, to the easterly of the docks, would be carried by wind and tide in an angle towards them of something less than 45 degrees.

The "Edith" was moved astern out of the slip between piers 46 and 44, into the waters of the bay, a sufficient distance to drift in the wind and the tide, with her stern pointing off shore, and her bow on shore, past all the pier-heads, including pier 34, so that she finally reached a point where her stern was on a line with the easterly end of pier 32, with her bow pointing still towards the shore at nearly right angles. That is to say, at the end of her drift, the entire length of the ship was inside of the extension of the line of pier-head 32 (Captain McDonald, of "Edith", pages 39 and 40). She backed enough just before she struck, to collide with the easterly corner of the pier at a point a third the distance aft from her bow (41). Projecting her angle of drifting back from pier 32, and clearing pier-head 34, she could not have been less than 700 feet from pier 42 when she started to have finished up her drifting in the position which her captain has showed she was in at the end of the drift. The probabilities are that she was still further out in the bay from pier-heads 42 and 44, because of the greater on-shore set of the tide further out in the bay, than at the end of her drift between pier-heads 34 and 32, where the water runs more nearly parallel to the pier-head line.

The following sketch, which is a copy of the exhibit in evidence as far as the outline of the piers is concerned, illustrates these basic facts of the problem.



1. "Edith" and "Fearless" leaving pier 44.
2. "Edith" when "Fearless" dropped line.
3. "Edith" where her captain described her at end of drift.
4. "Edith" if she had dropped anchor.
5. "Edith" if anchored along line of drift; 180 feet chain dropped 50 feet.
6. "Edith" if anchored along any other line of drift taking her clear of piers 36 and 34.

Small arrows—direction of tide out in bay setting on docks. Parallel to pierhead line closer in.

None of these facts, we understand, are disputed, save that the captain and the mate of the "Edith" asserted that she began her drift with both her own and the tug's engines stopped, when her bow was within fifty feet of the easterly end of pier 42, a condition, which, if true, would have brought her up against pier 40 in the on-shore movement of wind and tide.* We

*The "Edith's" captain had started his engines ahead with a starboard helm to send her on a course ahead towards the docks and curving to port around the time the tug stopped pulling astern (36). He must have been a considerable distance from the docks to have

understand it to have been admitted in the lower court that the captain and mate were in error in their statement as to the distance the "Edith" was off pier 42 at the time she began to drift. The admitted circumstance of the wind and tide and the place of termination of the drift made the greater distance from pier-heads 44 and 42 as the given fact of the problem; and, as to this, all of the other witnesses are substantially agreed. The exact difference is immaterial it being shown that she drifted free of all these intervening pier-heads.

The distance from a point 700 feet off pier 42 to the end of pier 32 is about 1800 feet. The distance from the northerly side of the slip between piers 44 and 46, to pier 32, is about 2100 feet.

On the morning of the fourth, or the afternoon before, the captain of the "Edith" telephoned to the owners of the tug "Fearless" to "assist" him on his trip to the drydock (30). The "Edith's" captain said he did not then expect the tug to help him out of the slip where he was moored (50); but only that he would be assisted in entering the drydock at the end of the trip. Obviously, no plan for the maneuver of backing out and turning to the south could have been communicated by the "Edith's" captain to the tug's through her owners at this time, and it is not so claimed.

When the tug under the command of Captain Sandstrom came alongside the "Edith", Captain McDonald changed his mind and concluded to avail himself of the

thought this maneuver possible. If the vessel had been but 50 feet from pier 42 the tug would have helped the wind and tide drive her against pier 40 as its power pulled her stern to starboard and toward the docks.

tug's assistance in the maneuver he contemplated for backing out of the slip and turning his vessel to the southerly.

The captain's deposition tells us that the "Edith" had forty per cent deeper draft at the stern than at the bow. That is, she was drawing ten feet aft and six feet forward (48). While the failure to produce the logs leaves us without the exact figures, the depositions of the mate and captain agree that the "Edith's" bow was much higher out of water than her stern and hence much easier to swing either by the wind or the tug. Obviously, the place of assistance for a tow boat in swinging the "Edith" after she backed out into the wind and tide, was from her bow. It seems, however, that Captain McDonald's plan contemplated that after the vessel had backed out from the slip the tug would then move from her position astern to a position off the starboard quarter and pull the deeper stern of the vessel to the westerly and starboard while he would endeavor to turn the "Edith's" light and high bow to port into the southeasterly wind as he went ahead on the ship's engines toward the docks on a starboard helm.* He, of course, could have as well gone astern with a port helm and not risked a nearer approach to the docks, while the tug was pulling the bow to starboard.

It is not important which of the three maneuvers was preferable—the first and third were indubitably prac-

*If this really was the "Edith's" captain's intended maneuver he was in clearly admitted fault. After backing out he says he stopped and then started ahead on a starboard helm, when the tug was still straight astern where he could not even see her (Dep. 59, 56). The tug of course could not pull the heavy stern around from directly behind nor move to the port side to do so while the steamer was going ahead.

ticable as well as a fourth maneuver; this was that the tug should drop its tow line when the vessel had backed out of the dock and as soon as the line was hauled in the "Edith" should continue backing with her stern turning to the southeasterly away from the docks until the vessel was parallel to them; and then going ahead on a course on a port helm curving to the northerly, easterly and then southerly till pointed to her destination.

It is vitally important that the "Edith's" master, who was in command of the maneuver, not only failed to communicate to the tug which of the four possible maneuvers he contemplated (Dep. pp. 50, 51, 58), but failed to give the tug any code of whistle signals to guide the tug from time to time as the maneuver he chose developed.

He, therefore, must be charged with leaving to the discretion of the master of the tug the determination from the obvious actions of the ship what the next act of the tug was to be and the reasonable expectancy that if the tug started on a maneuver which was not helpful to his plan the "Edith's" captain would advise him *viva voce* through the particular mate who guarded the end of the tow line fastened to the ship, the point to which the eye of the tug master would naturally turn.

The master of the "Edith" being the dominant mind, was therefore solely responsible if this less certain method was productive of any confusion which might possibly arise.

However, not only did the "Edith's" master fail to communicate his plan or arrange for whistle signals, but he also failed to notify the second mate in charge of the after tow line that he was to act as the agent through whom commands would be given to direct the activities of the tug or stop her if she was not acting in coordination.

Captain McDonald's deposition says (55):

"Q. At any rate you didn't arrange any signals.

A. No.

Q. You depended on passing word by the second officer?

A. By the second officer.

Q. What was the second officer's name?

A. Hanson."

Hanson's deposition is (90, 91, 99) as follows:

"Q. You said you expected the tug to get orders from the master? A. Yes.

Q. How were you expecting the master of your ship—he was on the bridge, isn't that right?

A. Yes.

Q. How did you expect the master on the bridge of your ship to give an order to the tug to go ahead. A. By the whistle.

Q. What whistle would he make?

A. That depends on which way they make it out between them.

Q. What?

A. They make that out between them what kind of a whistle they are going to use.

Q. They usually agree on what the signal shall be? A. Yes. (Dep. pp. 90, 91.)

Q. Your duty on the stern is to keep an eye on the towing line?

A. But we are not supposed to watch the tug too; he is supposed to give us a signal what to do.

Q. Who is? A. The tug captain.

Q. What signal did you expect the tug to give?

A. I expected the tug captain to blow a short blast the same as the rest of them do.

Q. Had you ever been towed by that tug before?

A. No.

Q. Did you ever have any conversation with her master before starting out as to what signals he would give you? A. No, sir.'' (Dep. p. 99.)

The ''Edith's'' captain expected the communication to be through the second mate; the second mate knew nothing about this, but expected the communication to pass between the two captains by whistles. He neither looked at the tug's captain nor his own but busied himself with other matters about the ship at important moments (99, 98).

In this basic disorganization from which the subsequent confusion and damage arose, the master of the tug had no part. It was not his duty to inform the ''Edith's'' second mate that his own captain had not advised the tug of the intended maneuver and that he had arranged no code of whistle signals with the tug, and that he, the ''Edith's'' mate, was the person to whom he was to look for any correction of any action on his part which did not fit into the ''Edith's'' undisclosed plans. When the second mate gave him the ''Edith's'' hawser and told him to go ahead, he was entitled to rely on the scheme of communication in both his and Captain McDonald's minds, i. e. through the second mate.

In all this, it must be noted that both the depositions admit the tow line used in assisting the "Edith" in backing from the dock was not over 30 fathoms in length. When we consider that the line had some curve in it down from the ship we see that the mate when standing on the stern and the tow boat captain were not much over 150 feet apart—easy megaphone and visual distance. The tow boat captain knew that his every act was within sight and in calling distance for correction if it did not fit into the "Edith's" plan. It was no fault of his that the "Edith" was both blind and dumb so far as concerned communicating with him while he was assisting off her stern and that he erroneously believed she could both see and speak.

While the "Edith" was lying at the north side of pier 46 a line was passed from her stern to the tug and, through a not to be unexpected misunderstanding, the ship's forward lines mooring her to the dock were not cast off when the tug began to pull and the tow line parted. The forward moorings were then loosened and the vessel drifted in the tide across the slip to the south side of pier 44. No harm came to the ship from this mishap, but the "Edith's" captain was plainly reminded that he should have a clear understanding with his mates as to the method of communication with the tug. He was also warned of a loss in his supply of hawsers and that if he needed any assistance in hawser service from the tug he should have found out what she had and planned for their use.

While the vessel was lying against the south side of pier 44, the other end of the same tow line was passed

to the tug, which was lying astern. The line had an eye on its end and it was placed over the towing bits of the tug. Three or four men (89) beside the mate handled the end of the line on the "Edith".

The tug on a signal from the captain through the mate (55) began to pull the ship backward assisting the ship's reversing engines. This continued till the vessel had reached a point out in the bay from which she drifted on the on-setting tide and southeasterly wind till her full length was inside the head of pier 32 (Dep. McDonald, 39, 40). As we have shown, this starting point of the drift must have been where her bow was some 700 feet off pier-head 42.

When at this distance from the docks, the tug captain claims that he saw the "Edith's" propeller stop and concluded that she did not desire to go any further astern and that he would assist at the bow in turning her light head into the wind. He says he stopped his own engine, let the vessels drift towards each other till the line had slackened, then had his crew unfasten the line from his bits and held by hand for an interval when it dropped into the bay. It would take but five minutes for only two men to haul it in (330) and of course a much shorter time with the larger number of men handling it (89).*

All this he was entitled to presume was under the eye of the mate of the "Edith" who could have halted the maneuver at any moment until the line was in the water,

*In the lower court the "Edith's" counsel confused the time for two men to haul the line in with that for the three or four men actually there.

or after it was cast off, order the tug to pick up the floating line (with its boat hook from its low stern), refasten it and recommence the towing astern. There is a dispute as to whether the "Edith's" engines were stopped when the line was disengaged from the tug's bits, or when it was dropped into the bay, but this becomes causally immaterial in view of the adoption of the tug's maneuver by the ship without protest.

Instead of attempting to halt the act of the tug or to have it recommence its stern towing, the "Edith's" second mate adopted the tug's maneuver. He had his crew of three or four men (89) commence at once to heave in the 30 fathoms of tow line and continued to do so successfully until the eye on its end reached near the "Edith's" stern where it, in some unknown manner, fouled the propeller, was severed from the rest of the line, and remained attached to one of the propeller blades till the vessel reached the drydock.

The depositions are perfectly clear on this point, namely that the whole length of the line lay in the water, without slack, when the second mate said he saw the tug "leave it go" (Dep. 98); that he heaved "right in" (Dep. 100) "as soon as the tow boat threw it off" (Dep. 73), and that it was the *end* of the line that caught (86).

The second mate says at page 86:

> "Q. When you reached drydock did you notice the propeller? A. Oh, yes.
> Q. What did you see?
> A. I saw the *end* of the line around the shaft, *around the wheel.*"

The "Edith's" captain says at page 60:

> "Q. Why do you say that the line fouled the wheel, you didn't see it, did you? A. Yes.
> Q. How did you see it?
> A. I got the *end* off after when we went into drydock."

The part of the line cut off by the propeller was brought to the court house, but the judge did not inspect it. The superintendent of the dock testified it was in two pieces, including the eye at the end, one 30 and the other 18 feet long.

The captain's deposition says at page 60:

> "Q. Did you say that the mate had hauled in the line?
> A. Not then, when the engines were stopped, *but before we took time to stop them* the mate was hauling the line in, and it was afoul of the wheel."

Further evidence that it was the *end* that fouled and while the propeller was turning, is the fact that the second mate, who was watching it being heaved in, did not know it was cut till after it was hauled up (100).

Since it lay at length in the water without slack, it must have been hauled for over a hundred feet of its length before it caught in the propeller. Its fouling must have been noticed if it had been caught before this time. The point at which the line was caught in the revolving wheel was off pier 42. The engines were stopped off pier 42 (Dep. 38) and hence the alleged dropping was at or before that time.

Conclusive evidence that the "Edith's" engines were going ahead for some time after the line was cast off is

McDonald's deposition that the "Edith" was going ahead *through the water* at the time her engines were stopped (37). This momentum forward must have been acquired after the tug's lines were cast off or she would have been pulling the tug (lying dead astern, 59) backwards through the water. In other words the engines must have been working for some time while the line was being hauled in.

At this point the unexcused failure to produce the "Edith's" engineer or her engine room log or deck log or the members of the crew hauling the lines, becomes of interest. The logs were demanded on the 20th day of March, 1917, nearly three months before the trial. We may assume that it would have shown the jarring of the propeller shaft as the tow line struck against the stern frame with the propeller twisting it around and that the moment when this occurred bore a causal relationship to the captain's orders to reverse, to stop, and to go ahead (Dep. 58-59). We may infer that the mate's log and men handling the line would emphasize the captain's and mate's testimony that the line had been hauled in to near its end before it was cut off and hence that the engines continued to turn long after they had been hauling it.

However, apart from the missing logs and witnesses, we can see no other conclusion to be drawn from the testimony of the depositions than that the length of the line was hauled in to near its end before it was fouled in the propeller, which was then turning and that in hauling it in at all and not asking the tug to pick it up again the ship adopted and ratified the tug's maneuver

to cease her stern towing before any harm had arisen. The tug certainly cannot be held at fault if her maneuver is thus adopted without protest from the ship, and the propeller continued to turn long after the line had been cast off.

The depositions are equally clear as to *the absence of any warning to the tug* that the "Edith's" propeller was fouled and that for the remainder of the period of the drama from pier 42 until the vessel was in extremis within 200 feet of pier 32, her captain regarded her as a "dead ship" with engines out of commission.

In other words, the whole character of the tow was changed from an "assist" to the engines of the "Edith", to the duty on the tug to furnish full power to bring the vessel away from the docks, without the slightest hint to the tug's captain of the change. The "Edith's" captain's language in this is clear and specific. He says, deposition pages 61, 67, 68 and 76:

> "Q. As it stands, you were saying that the line fouled the wheel because some one else told you so, that was the situation at that time?
>
> A. Yes, sure.
>
> Q. Did you give the tug any orders after that stage of the maneuver? A. No."

In describing the causal responsibility for the loss he said:

> "Q. I understand that in this position you were about 150 feet, the 'Edith' was bout 150 to 200 feet from pier 32, is that correct? A. I think so.
>
> Q. Was it in that position you started your engines astern (referring to Claimant's Exhibit 'A')?
>
> A. Yes.

Q. You didn't have any difficulty in operating the engines, did you? A. Not after we started, no.

Q. Was that the first effort that you had made from the time that the line was cast off, as you say, up to the time that the bow-line parted?

A. Yes.

Q. Why was it that you did not make an effort to start your engines before?

A. I was rather afraid when the seven-inch line fouled the wheel, thinking the towboat would have it performed or we would get out without that.

Q. Didn't you think that there was a position of danger there? A. I could readily see it.

Q. When did you first see that?

A. The danger of the line being around the wheel?

Q. No, I mean did you think there was a position of danger from your drifting down, as you have described? A. Yes, I did.

Q. You knew that eventually you must bring up against something, did you not?

A. I surely did.

Q. How was it, I want to know why it was that you did not start your engines before you did?

A. Because I didn't want to, I was afraid to attempt that, I was depending on the towboat.

Q. Had you had any communication with the engine room from the time that the second line was cast off up to the time that the third line was cast from your bow to the tug? A. No.

Q. Had not sent any word down to the engineers about this. A. No.

Q. *And yet in that time you had drifted down from off pier 42 to this position between pier 34 and pier 32, is that true? A. Yes.*

Q. Do you know how long that distance is?

A. No.

Q. Didn't you think that the situation there demanded that you take some risk to save your vessel from collision with the pier?

A. *I was expecting the towboat to do something, depending on the towboat.*

Q. You were relying on the towboat?

A. Depending on the towboat.

Q. You did not anticipate that this towboat could handle your steamer in that wind and tide without some assistance from the steamer, did you?

A. No, but it could easily swing us around, though.

Q. As to the fouling of the propeller, you now know, of course, that the propeller, if it was fouled at all, at the time you thought it was, was not fouled sufficiently to have prevented moving the engines, was it?

A. We found that out afterwards.

Q. So that you were acting under a misapprehension of the situation, were you.

A. Apparently, yes."

Again, Captain McDonald says (p. 78):

"Q. *What do you think was the cause of this disaster?"*

A. *Getting the line in the wheel.*

* * * * * *

Q. You concede now that your engines *could* have been moved?

A. *That has the same effect on your mind as if it was not.*

Q. Won't you concede that your engines could have been moved?

A. Anyone would have to concede that because it was done, *but the effect on your mind is just the same, I should judge."*

The evidence of the depositions as to the absence of the warning to the tug's captain of the change of the character of the "Edith" from an engined vessel to a hulk is in accord with Captain Sandstrom's uncontradicted testimony (f. 300).

"Q. *Did anyone aboard the vessel, aboard the 'Edith', ever suggest to you that the line was in the wheel?*
A. No."

The evidence being clear and specific that the "Edith's" captain believed when off pier 42 (p. 68) that his engines were disabled and did not intend to attempt to use them; and that the tug's captain, in the absence of warning, properly believed that during all this time nothing had happened to the "Edith's" engines, and that she could go astern or ahead under her own power at will, when the line was hauled in, the various maneuvers open to each from *his own view point* therefore became pertinent.

The maneuvers and conduct open to the "Edith's" captain were:

(1) He could drop his anchors at once. They were patent anchors and could be dropped instantly on lifting their brake-bar. The vessel would then have run along till she brought up on her chains and swung round on his head till she was down wind and held in the tide. Since she cleared even pier 36 by a good margin when she drifted down, she would have ridden safely at anchor along this drifting line even with 180 feet of anchor chain out (42). The captain's excuse (64) that he started to drift only forty feet off from pier 42 and would have swung on the pier ends if he anchored is answered by the clearly established fact that she must have started to drift some 700 feet out from pier 42.

He admitted the tide paralleled the pier-head closer in (64) and that her stern was over 40% deeper in the tide than her bow which the anchor would hold while the tide kept her stern away from the docks.

(2) He could have ordered the tug to take another line off her stern by backing up to the "Edith" on a course well around the floating end of the tow line, or, receiving the line from the "Edith's" starboard side to which the tug went (329) and have her tow the "Edith" further away from the docks, straight astern where the pull would have been easy *across the wind* and hence requiring a much lighter hawser. All the tug's power would then have been spent in pulling the vessel lengthwise through the water instead of being wasted in attempting, as he later ordered, to pull the "Edith's" light bow to port against the wind and toward the docks.

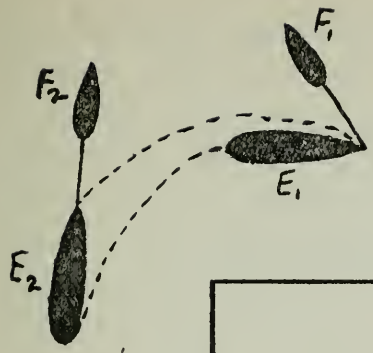
(3) He could, if he had so desired (though his owners would never have forgiven him) have called to the tug and frankly resigned the control of the maneuver to her and given *her* the choice as to where *she* should apply her power, with full information that the ship was disabled and could not aid by backing. No doubt, the tug captain would have ordered the "Edith's" anchors down at once and when she had swung around with the tide have taken a bow line from her. When her powerful winches had quickly hoisted the anchors the tug would have pulled her to her destination at the drydock; or

(4) He could have made the fatal blunder he did, i. e. of letting the "Edith" drift from 42 to 32 without even trying his engines to see if they would work, permitting the tug to labor under the delusion that he could rely on her power as soon as the tow line was hauled in, and actually giving the tow a line to waste his power pulling the "Edith's" bow parallel with, if not towards, the docks while the wind and tide were taking her on to them.

The tug's captain, ignorant of any engine trouble on the "Edith" (or delusion in her master's mind), and having the dropping of his line accepted by the steamer's mate in hauling it in without protest, could in the absence of command from the "Edith" have entertained either of the two following suppositions:

(1) He could properly believe that the "Edith" was in no danger of any kind; that her tow line had been successfully hauled in and that she could back wherever she pleased at any time; and that there was no *necessity* for any haste on his part or indeed for any further service at all till they reached the drydock; or

(2) He could believe that the "Edith" intended as soon as the tow line was in to back round towards her starboard and northerly out and down the bay and have taken his tug round to help her, if she found it convenient, with a line pulling her head to port. This maneuver would have been as follows:



E_1 "Edith" reversing and backing to her starboard eases strain and assists F_1 "Fearless" in swinging head around with minimum strain on towing hawser.
E_2 and F_2 at end of maneuver.

This was an absolutely safe common sense maneuver and he went to the "Edith's" starboard bow (Dep. McDonald 39) where McDonald gave him a line and directed him to pull her head in this direction (Dep. McD. pp. 65, 66) but unhappily without knowledge that he must take the heavy strain on the tow line without help from the ship's engines, and with the result that the tow line broke.

The difference between the strain on the tow line with the help of the ship's engines backing and swinging the stern to starboard and the bow to port and towards the tug, and the dead pull of the vessel's high bow into the wind is obvious. The tug's captain was entitled to believe he would receive the assistance of the ship's engines, but the "Edith's" master knew when he ordered the tug to pull to port (66) that he would not render any such assistance acting under his undisclosed delusion that his engines were disabled.

When we consider the disabled condition of her engines (no less real because imaginary) the order of the

"Edith's" captain to have the tug pull her bow parallel to the pier heads, placed the vessel *in extremis*. His delusion as to the propeller is as much a factor in determining this question as was the on-shore set of the wind or the tide or the greater projection of pier-head 32. No blame can attach to Captain Sandstrom as to any act of his from this point on. Indeed, his permitted belief that the "Edith" could use her engines was one of the gravest factors of danger because it lead to the erroneous conclusion that the strain on the light tow line he received would be lessened by the vessel swinging her bow towards him by backing the "Edith" stern to port.

There is a dispute in the testimony as to whether, after the arrival of the tug at the "Edith's" bow, a demand was made for the tug's heavy 12-inch hawser. It is not claimed that it was before the vessel was well towards the end of her drifting. The tug had no knowledge that the vessel could not use her engines, nor did any of the "Edith's" officers say she was short of lines. The tug's captain does not recall a demand for his heavy line, but says that it would have been much slower to attach to the ship on account of its size and weight.

The District Court made a finding that the vessel was in fault for not giving up this line to the tug, but did not consider it the proximate cause of any damage. If we are correct that the real cause of the loss was the "Edith's" failure to plan and organize for the maneuver, her captain's failure to drop her anchors when he thought her engines disabled, and his permitting the tug to act in ignorance of her inability to use her en-

gines, then the question of furnishing this heavy tow line was immaterial.

The tug captain's act must be judged by *his* knowledge. When out in the stream he was entitled to believe that the vessel was safe without any tow line as she was supposed to have her full engine power to back away from the wharves. When close into the pier 32, the tug was the best judge as to the time it would take to make fast any lines in the emergency. Quite likely, if he had known that the sole reliance of the ship was the hawser and that the full strain of her 2700 tons would pull on it, he would have insisted that the attempt be made to put the heavy tow line aboard the "Edith" for *any* maneuvers, even in an emergency requiring quick action, but no such knowledge was in the tug captain's mind and he cannot be held responsible.

It is interesting to note that Captain McDonald, who knew he had failed to advise the tug of his disabled engines, makes no complaint of any failure to furnish the "Edith" with this hawser, either when questioned as to the third tow line, or even in response to such questions as "What do you think was the cause of this disaster?"

The depositions of the captain and second mate reinforced by the unexplained failure to comply with the demand for the logs and the absence of the other vital witnesses from the "Edith" clearly established the following faults on her part.

1. Although the dominant mind, she failed to disclose her plans to the tug; or, alternatively, she failed to

establish a code of whistles, or a means of *vive voce* communication through the mate between herself and the tug, to control her as the undisclosed maneuvers developed.

2. She accepted the dropping of the tug's line without disclosing that it did not fit into her proposed maneuver.

3. She kept her engines turning ahead for some time after the tug's dropping of the line had been ratified by her hauling it aboard, whereby the line was fouled in the wheel.

4. She failed to drop her anchors off pier 42 when she could safely have done so, although she believed her engines crippled and did not intend to use them.

5. She failed to try her engines after she knew the tow line was hauled in and the end fouled in the blades and while she was drifting past piers 42, 40, 38, 36 and 34, but acted on the theory they were crippled when in fact they were not.

6. She acted on the belief that she had transferred the command of the maneuvers from herself to the tug without advising the tug of this fact so as to give her the discretion to order the "Edith" to anchor, as the tug would undoubtedly have done if knowing of the useless engines.

7. After she began to drift towards the docks she accepted the service of the tug for a maneuver requiring

the assistance of her engines without telling her that her engines could not be used.

8. She relied on the tug's furnishing certain hawsers without arranging for their use in a preliminary discussion.

9. She negotiated for the use of the tug's lines without disclosing to the tug the crippled condition of her engines to enable the tug to determine the character of lines needed.

It is clear that the proximate cause of the loss were these faults of the "Edith".

THE FINDINGS.

The learned District Judge apologizes for the failure to write and file an opinion (354). On an admiralty appeal the opinion performs an important function. It is required by the Rules to be a part of the Apostles.

C. C. A., Rule No. 4;
Benedict Adm., Sec. 581 and note.

Its purpose is to disclose the complete mental process of the judge in arriving at his conclusions. It is not improper to suggest that the haste arising from both sickness and a crowded war calendar, excuses this failure to comply with a practice thus embodied in the rules.

The court's findings are as follows (354):

> "Lacking the time to prepare an opinion in this case, I can only state my conclusions from the testimony as follows:

1. The master of the 'Fearless' was at fault in not consulting with the master of the 'Edith' as to the maneuvers intended by him before he undertook to execute them.

2. He was also at fault in casting off the line without warning and while the 'Edith's' wheels were turning.

3. To these faults the accident was due.

4. The 'Fearless' should have passed to the 'Edith', after letting go of her and while she was drifting, a line of sufficient strength to hold her, and should have been prepared to do so. This was not done.

5. The 'Edith' was not at fault for not dropping her anchor, as she was entitled to believe that the 'Fearless' would care for her properly.

A decree will be entered fixing the responsibility of the 'Fearless', and referring the cause to the master to ascertain and report the amount of damage suffered by the 'Edith'."

Two of the four findings are declared causative. The third is distinctly separated from the others as not being causative of the loss. The last decides that the "Edith" was entitled to rely on the tug to extricate her from her position.

As to the first two findings, we have shown conclusively from the *depositions* of the master and second mate:

(1) That the "Edith" was the dominant mind and that it was her duty to disclose her contemplated maneuver to the tug.

(2) That the "Edith" concurred in the dropping of the hawser and gave the tug no notice that dropping it had in any way affected her engines, although the tug was

always within hailing distance. What the effects of this action were on the causal chain is developed in our statement of facts.

As to the last finding that the "Edith" was entitled to "rely" on the tug, the district court's error is similarly shown by the depositions. The "Edith" should have dropped her anchors off pier 42. To rely on the tug, she should first have protested and not quietly accepted the dropping of the tow line; and then disclosed either that she had transferred the dominion over both vessels, or that her engines were (supposed to be) disabled and thus compelled the tug to assume that the dominion was transferred.

As to the third and non-causative finding, before this court can decide that it *was* causative, it must review all the facts in the record.

It thus clearly appears that the court must consider our appeal *do novo* without any hampering inference based on the adverse findings of the lower court.

Specifications of Error Relied Upon.

(4) That the District Court erred in holding, deciding and decreeing that the injury and damage to libelant's vessel, the "Edith", was due to the fault of the American Steamtug "Fearless", the respondent herein, and that there was no fault on the part of the libelant's vessel, the "Edith".

(5) That the District Court erred in not holding, deciding and decreeing that the collision of libelant's

vessel, the "Edith", with pier 32 and the injury and damage to libelant's said vessel were solely due to the fault and negligence of libelant and its said vessel.

(6) That the District Court erred in not holding, deciding and decreeing that the collision of libelant's vessel, the "Edith", with said pier 32 and the injury and damage to libelant's vessel, if due to the fault and negligence of the "Fearless", were, nevertheless, proximately due to the contributory negligence of the "Edith".

(7) That the District Court erred in holding and deciding that the master of the "Fearless" was at fault in not consulting with the master of the "Edith" as to the maneuvers intended by him before he undertook to execute them.

(8) That the District Court erred in holding and deciding that the master of the "Fearless" was at fault in casting off the line without warning and while the "Edith's" wheels were turning.

(9) That the District Court erred in holding, deciding and finding that the master of the "Fearless" cast off the line without warning and while the "Edith's" wheels were turning. [307]

(10) That the District Court erred in holding and deciding that the accident was due to the alleged faults of the master of the "Fearless" in not consulting with the master of the "Edith" as to the maneuvers intended by him before he undertook to execute them and in casting off the line without warning and while the "Edith's" wheels were turning.

(11) That the District Court erred in holding and deciding that the "Fearless" should have passed to the "Edith", after letting go of her and while she was drifting, a line of sufficient strength to hold her and should have been prepared to do so; and in holding and deciding that there was any duty upon the part of the "Fearless" to pass a line to the "Edith" at all.

(12) That the District Court erred in holding and deciding that the "Edith" was not in fault for not dropping her anchor.

(13) That the District Court erred in holding and deciding that the "Edith" was entitled to believe that the "Fearless" would care for her without co-operation from the "Edith" by the latter's dropping her anchor.

(15) The District Court erred in not holding and deciding that if there was negligence and fault upon the part of the "Fearless", nevertheless, there was contributory negligence on the part of the "Edith" proximately causing said accident and the injury and damage to the "Edith" flowing therefrom. [308]

(16) That the District Court erred in not holding, deciding and decreeing that said accident and the injury and damage to the "Edith" were due to the failure of the master of the "Edith" to anchor her on "thinking" his steamer disabled by the line in her wheel.

(17) That the District Court erred in not holding, deciding and decreeing that said accident and the injury and damage to the "Edith" were due to the failure of the first mate of the "Edith" to pass promptly a good

line to the "Fearless" when she was drifting toward pier 32.

(18) That the District Court erred in not holding, deciding and decreeing that the said accident and the injury and damage to the "Edith" were due to the failure of the master of the "Edith" to go astern on the "Edith's" engines instead of allowing her to drift so close to pier 32 before backing that she could not get away from it before colliding.

(20) The District Court erred in not holding, deciding and decreeing that the "Edith" had her own power, that this was an "assist" and not a "towage" and that the duties and responsibilities of the "Fearless" were those of an assisting and not of a towing vessel.

(24) That the District Court erred in not holding, deciding and decreeing that the fouling of the "Edith's" propeller by the line, if there was such fouling, was due to the negligence and fault of the "Edith" in moving her propeller before the line had been taken in.

(27) That the District Court erred in not holding, deciding and decreeing that it was the duty of the "Edith" and not the duty of the "Fearless" to furnish the lines and all the lines required in the maneuver.

THE BURDEN OF PROOF OF GROSS ERROR ON THE PART OF THE TUG.

The burden of proof which the libelant is called upon to sustain in a tug case has found frequent expression

in the decisions. It is not enough to show that the proximate cause of the loss is an error of judgment on the tug's part. The evidence must show a *"gross"* error of judgment.

The Czarina, 112 Fed. 541:

> "The obligation of a tug is to use ordinary care and diligence with respect to all matters connected with the service she has engaged to perform, and a mere error of judgment on the part of the master will not render her liable for the loss of the tow, unless the error was so gross that it would not have been made by a master of ordinary prudence and judgment."

In

The James P. Donaldson, 19 Fed. 264,

affirmed (21 Fed. 671) (on exemption of the tug from liability for negligence) the writer of the opinion, speaking of two different routes, either of which the master of the tow might have selected, says:

> "The disaster which befell him undoubtedly tends to show that he made the wrong selection, but the propriety of his action must not be determined by the result. He can only be chargeable with negligence when he takes a course which good seamanship would deem unauthorized and reckless. 'The owner of a vessel does not engage for the infallibility of the master, nor that he shall do in an emergency precisely what, after the event, others may think would have been the best.' The Hornet (Lawrence v. Minturn), 17 How. 100; The Star of Hope, 9 Wall. 230; The W. E. Gladwish, 17 Blatch. 77, 82, 83; The Mohawk, 7 Ben. 139; The Clematis, 1 Brown, Adm. 499."

The Circuit Court of Appeals for the Second Circuit says in affirming the decision of the District Court in

The E. Luckenbach, 113 Fed. 1017, affirming 109 Fed. 487:

> "The facts are quite fully stated in the opinion of the district judge. In one respect his statement of them is fairly open to criticism. The testimony hardly warrants the finding that there was a sudden increase of wind; *but we concur with him in the conclusion that the allegations of fault on the part of the tug are supported mainly by the wisdom that comes after the event.* It would have been good judgment to stay in port. It would have been good judgment to turn back at Sewall's Point, when return was feasible and safe; *but we are not prepared to say that in deciding to push on the master of the tug displayed such bad judgment as would amount to recklessness or negligence.* * * * The master made a mistake in pushing on beyond Sewall's Point, but we concur with the district judge in the conclusion that *it was not an error of judgment so gross as to justify a finding of negligence.* The decree is affirmed with costs." (Italics ours.)

Again,

> "Where the master of a tug is an experienced and competent man, much must be left, as occasion arises, to his judgment and discretion in the management of the tow; and a mere error of judgment on his part will not render the tug liable for the loss of her tow, unless the error was so gross that it would not have been made by a master of ordinary prudence and judgment."
>
> *38 Cyc.* 567.

See, also,

The Ivanhoe, 90 Fed. 510;

The Startle, 115 Fed. 555;

The William E. Gladwish, 196 Fed. 490.

To sustain that burden, the vessel must, in view of the principles laid down by the courts (supra), prove not merely that the master of the tug erred, but that his error of judgment was gross—otherwise negligence is not laid to his door.

These, then, are the rules which apply where the contract is for "towage" with the tug in full charge. *A fortiori* it follows that a tug which has contracted only to "assist", and that only in and about the lighter duties of "assisting", not directing (the master of the vessel retaining the supremacy of command and responsibility) is not an insurer, and can be held only for failure to exercise reasonable (not the highest) care and skill, and that her liability for damages is established not by showing what might be an error of judgment on the part of one charged with the high responsibility of one in full control of tug and vessel and the project in its entirety (which even then must be a *gross* error), but only by showing gross error considering that the duty is only to attend and "assist" a vessel in command of her own master.

> "Of course the relations between the tug and the tow may be modified by express agreement, or the reasonable implication arising from the circumstances and nature of the employment in a particular case" (an "assist" for instance), "so as to make the tug the mere servant of the tow and under its direction; in which case the liability of the tug may be limited to the mere point of furnishing a sufficient motive power for the tow, while the whole responsibility as to the time and manner of making the voyage or transportation will rest with the latter."
>
> *38 Cyc,* 565.

> "The owners of a tug are liable for negligence in performing *the special duty they have undertaken, and not otherwise.*" (Italics ours.)
>
> *38 Cyc,* 566.

What was the "special duty" undertaken by the "Fearless" in this case? To *assist* the "Edith", a vessel with her own motive power and, by her own desire, as indicated by the character of her order for the tug, retaining control of the operation and primary responsibility for it in her own master, from pier 46 to Hunter's Point drydock. The tug was merely in attendance to aid as the "Edith's" captain should expressly direct, or where, for reasons good to himself and on his own responsibility he omitted to direct, by acting as might seem wise and proper according to the exigencies of the occasion. For, while, as heretofore pointed out, the master of a vessel in control may instruct, he often leaves the moves to the judgment of the tugboat captain (Tes. 101), relying on that judgment, and in such event can complain only if that judgment be abused. In other words, the vessel's master may in an "assist" instruct the tug if he choose; that is, indeed, his duty. If he does not discharge it, he can ask only an honest and competent exercise of discretion from the tugboat captain, and, if events do not clearly reveal the intention and program of the "dominant mind" (that of the master of the vessel), no fault attaches to the towboat for misreading it.

THE CASES SHOWING THAT THE "EDITH" IS ESTOPPED FROM CLAIMING DAMAGES ON ACCOUNT OF THE TUG'S DROPPING OF THE LINE, BECAUSE SHE ASSENTED THERETO AND AGREED TO THAT PROGRAM WHEN SHE HAD A FREE CHOICE TO REQUIRE THE TUG TO PICK UP THE FLOATING LINE OR TAKE A SECOND STERN LINE OR COULD HAVE DROPPED HER ANCHORS.

When the line was cast off, the "Edith" was a vessel with power. Whatever may have been the situation afterward, her propeller *then* was free. The dominant mind was still her master's. The tug understood him to desire a casting off of the line. He claims now that he desired the tug to hang on. Assuming his claim to be true, the situation resolves itself simply into this:

The tug, having no express instructions from the "Edith", excusably misinterpreted her intent and dropped the line off pier 42, 1800 feet from the colliding point. *It was open to the "Edith" not to acquiesce in the casting off if she wished to persist in her original program,—all that was necessary was for her to signal the tug to pick up the floating line with a boat-hook (the stern of the tug is of course close the water) or take a new line. But the "Edith", having acquiesced—and she did so when, without any suggestion of dissent, her mate began taking in the line, apparently in full accord with the program, and subsequently when he failed to notify the tug of any fouling of the propeller—she estopped herself from thereafter complaining that the casting off of the line was improper, or, at any rate, from asking any damages on account of it.*

The law is well settled that a vessel having free choice to accept or reject a program, by accepting estops

herself from later complaining that it was improper and indeed obligates herself to co-operate to the fullest extent in carrying it through. This is especially true in respect to a vessel not merely having a choice, but being actually, as the "Edith" was, the dominant mind.

The Santa Maria, 227 Fed. 149, at 156:

"With respect to the Mehrer but little need be said. She as the leading tug was, to the exclusion of the Santa Maria, the Bristol and Brandywine, entrusted with the selection of the course of navigation. Knowing that she had in tow a large and ponderous vessel impossible quickly to be diverted *the course she was pursuing she was clearly in fault in assenting to and acting upon the single blast signal received from the Sweepstakes, instead of refusing to join in the proposed maneuver and promptly giving danger signals* and slackening her speed as far as could be done with safety. Had she done so it is probable that the Sweepstakes would not have persisted in pursuing her eastward swing from the westerly side of the channel, and the collision might and probably would have been avoided."

The Luther C. Ward, 149 Fed. 787 at 788:

"As to the first claim, it is sufficient that the vessels themselves settled the manner of passing each other, and, considering the distance between them, the Ward did not act under duress. If the Ward regarded the maneuver as faulty, her captain should have blown alarm whistles and stopped the proposed passing, compelling the Tice to go about, or otherwise dispose herself."

The Edgar F. Luckenbach, 124 Fed. 947 at 949:

"There was, therefore, ample opportunity for the vessels to conform to the rule and no adequate reason has been given for adopting a course at

> variance with it. Such course should not have been initiated by the Flint, but having been consented to by the Luckenbach, the latter should have been vigilant to conform to the agreement, in which duty it failed, no change of course having been made by her until the second set of signals when the vessels were in such close proximity that collision was imminent."

In *The Albermarle,* 1 Fed. Cas. 299 (No. 135), two steamers were meeting nearly head-on, so as to involve risk of collision, and accordingly exchanged signals of one whistle, signifying a port to port passing. Either they did not or could not port soon enough to avoid collision, and so far as the latter was the cause of the collision it was suggested that the giving of the one whistle signal in the first instance was erroneous and the vessel which gave it therefore liable. But in view of the acceptance of that signal, the court held (quoting from the head note):

> "That, if it was erroneous and dangerous to port, the vessel giving the signal as a proposition to the other, was not more culpable for doing so, than the vessel which assented, by the response, to the proposed movement, and that both became parties concurring in a hazardous and erroneous experiment."

In the

Arthur M. Palmer, 115 Fed. 417,

it was held that a vessel which assents by signal that another shall cross her bows cannot urge the attempted maneuver as a fault, though it results in a collision.

And see:

The San Rafael, 141 Fed. 270;

The Electra, 139 Fed. 858;

The Transfer No. 9, 170 Fed. 944;
The Columbia, 195 Fed. 1000.

THE EXTRAORDINARY FAILURE TO PRODUCE THE LOGS OF THE "EDITH" AND THE ENGINEER, FIRST MATE AND OTHER WITNESSES IN VIEW OF THE DELUSION OF HER MASTER AS TO HER ENGINES AND THE CASES ON SUCH NON-PRODUCTION.

Here the "Edith" was the admitted dominant mind in the maneuvers contemplated by her when she left the dock. The registering lobes of that mind are her captain's and engineer's scratch and official logs. They are of peculiar value in showing what went through that mind. The scratch logs are contemporaneous entries of her thoughts and acts; the official logs are her subsequent careful review of the events. Both are of vital interest in reviewing any tragic event through which the vessel has passed.

The Sicilian Prince, 128 Fed. 133, 136;
U. S. Rev. Stats., 4291.

The most important factor in this entire drama laid concealed in this mind of the "Edith's" captain till his deposition, taken long after the pleadings were filed. They were both drawn in complete ignorance of this secret. It was that, although her engines were free to turn, her commander believed that they were not and governed the entire conduct of the "Edith" under this delusion. What he said or signed for in these logs should have been given to the court. The logs were demanded at the taking of the captain's deposition (p. 48).

The penalty for non-production of the witnesses and logs when demanded, is the adverse inference described in the following leading cases:

The Prudence, 191 Fed. Rep. 993, 996:

"The failure of the Prudence either to produce the mate, who was in the pilot house at the time of the collision, or to account satisfactorily for not so doing, is a circumstance which the court cannot fail to observe, in reaching its conclusion. The Georgetown (D. C.) 135 Fed. 855. *Criticism is also made, and not without force, of the failure of the respondent to tender its log for inspection.* The Sicilian Prince (D. C.) 128 Fed. 133, 136. It is fair to say, however, in this connection, that the log was not called for, except in argument, and was then tendered." (Italics ours.)

Corpus Juris, vol. II p. 1186, note 16 (b);

The Santa Rosa, 249 Fed. 160 at 162.

"During the trial the production of these logs was demanded by claimants, and petitioner promised to produce them. This was not done so that it may at least be assumed that their production would not have helped petitioner's case."

The New York, 175 U. S. 187; 44 L. Ed. 126, 134:

"The force of this presumption of a defective lookout is greatly strengthened by the fact that the claimant did not see fit to put upon the stand the officers and crew of the New York, who certainly would have been able to explain, if any explanation were possible, why the lights of the Conemaugh were not seen and distinguished or her signals heard. It was said by this court in the case of Clifton v. United States, 4 How. 242, 246, 11 L. ed. 957, that 'to withhold testimony which it was in the power of the party to produce, in order to rebut a charge against him, where it is not supplied by other equivalent testimony, might be

as fatal as positive testimony in support or confirmation of the charge.' ''

The Alpin, 23 Fed. Rep. 815, 816.

"But the claimants knew that the stranding of their vessel was to be their defense; and their course in relying for proof of the stranding upon the admissions in the libels and testimony of witnesses, who, while knowing of the stranding, could not know how it was caused, when the testimony of those who would be the natural witnesses to prove such a defense was at command, indicates the existence of a reason other than that of surprise for the non-production of these witnesses, *and warrants a presumption that if the officers of the steamer had been called, they would have shown the stranding to have been the result of negligence in the navigation of the ship.*" (Italics ours.)

The Santa Rosa, 249 Fed. 160;

Clifton v. United States, 4 How. 242; 11 L. Ed. 957;

The Fred M. Laurence, 15 Fed. 635;

The Bombay, 46 Fed. 665;

The Georgetown, 135 Fed. 854;

The Sandringham, 10 Fed. 556;

The Gladys, 135 Fed. 601;

The Freddie L. Porter, 8 Fed. 170.

and see

Marsden's Collisions, 6 ed., 289.

In considering findings peculiarly based on what was in the "Edith's" mind, these adverse inferences must have great force.

In closing this heading of the brief it may well be remarked that the allegations of an answer drawn in ignorance of this secret delusion of the opposing ship

cannot have much weight. They could not rationally explain their vessel's interchanges with such an associate for the very good reason that they did not have any clew to her irrational acts.

CONTRIBUTORY NEGLIGENCE.

We believe that we have shown that the chain of proximate causation is made up entirely of the "Edith's" faults which we have enumerated at the end of our statement of facts, and that if any of the tug's acts are faults they did not contribute proximately to the damage.

But, assuming for the moment that they did contribute proximately, can it be said that the faults of the "Edith" are not so interwoven with the tug's that the tug must bear the whole blame?

If the tug, the subordinate agent, was in fault for not participating in the planning for the maneuver, was not the "Edith" the dominant mind at least equally in fault for directing the tug to go ahead in the maneuver, knowing her ignorance?

If the tug erred in disengaging the tow line and dropping it, was not the "Edith", in easy hailing distance, at least equally in fault in accepting this action and hauling in the line without protest or request to have it picked up, or a new stern-line taken?

If the tug (in ignorance of the "Edith's" crippled engines) was at fault for leaving her stern, was not the "Edith" at least in equal fault for concealing the crippling and acting as if all were well?

If the dominant control passed from the "Edith" to the tug was not then the "Edith" squarely in fault for not advising the tug she would not assist with her engines and thus give the tug the chance to order the "Edith" to drop her anchors or to tow from the stern instead of pulling the "Edith's" bow around?

If the tug was at fault regarding the use of its heavy hawser, was the "Edith's" failure to disclose that she could not (or would not) assist with her engines, a material factor in enabling the tug captain to make up his mind what lines he should use?

We submit that the District Court is in plain error here, regardless of what evidence we consider, and that the well established rule for a division of the damage would clearly apply.

The Max Morris, 137 U. S. 1 at 14;

J. T. Morgan Lumber Co. v. Coal Co., 181 Fed. 271.

For reasons thus set forth, we respectfully urge that the decree of the District Court be reversed and the "Edith" be declared solely in fault.

Dated, San Francisco,
October 16, 1918.

WILLIAM DENMAN,
MCCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.